STATE OF MICHIGAN COURT OF APPEALS

JAMISON VOLLMER,

UNPUBLISHED September 9, 2014

Plaintiff-Appellant,

 \mathbf{v}

No. 321358 Marquette Circuit Court Family Division LC No. 10-047551-DC

SARAH FRIEDRICH f/k/a SARAH BROOKS,

Defendant-Appellee.

Before: Shapiro, P.J., and Whitbeck and Stephens, JJ.

PER CURIAM.

Plaintiff, Jamison Vollmer, appeals as of right the trial court's order granting the motion of defendant, Sarah Friedrich, to change the legal residence of the parties' minor daughter to Lima, Peru. We affirm.

I. FACTS

A. BACKGROUND FACTS

The child was born in Marquette, Michigan. Vollmer and Friedrich were not married. The trial court awarded physical custody of the child to Friedrich. Vollmer is an operating room nurse who currently lives in De Pere, Wisconsin. At the time that Friedrich moved the trial court to change the child's residence, Friedrich and the child also lived in Wisconsin.

Vollmer has frequently exercised his parenting time while the child has been both in- and out-of-state. Vollmer testified that he has taken steps to maintain his relationship with the child. When the child is with Vollmer, she also frequently spends time with her paternal grandparents. Friedrich acknowledged that the child has a very close relationship with Vollmer.

In 2012, Friedrich married Bryan Friedrich, a tenured Foreign Service Specialist with the Department of State. Friedrich and Bryan Friedrich have one child, the child's half-brother.

B. MOTION TO CHANGE THE CHILD'S LEGAL RESIDENCE

In October 2013, Friedrich moved to change the child's legal residence to Lima, Peru. According to Bryan Friedrich, one of the requirements of his job is that he must change his

location every two or three years. In 2012, he was stationed in Kabul, Afghanistan. He was scheduled to return in March 2014. He received his next position in Lima, Peru through a bidding process. Bryan Friedrich testified that he would not accept the assignment in Lima without his family. If he turned down the post, he would be placed on "leave without pay status" while waiting for a new assignment.

He bid highly on Lima, Peru because he believed it was a good family post and he did not feel unsafe in Peru. Bryan Friedrich did not know where the family would relocate after two years in Peru, but he intended to retain oversees positions for six to eight years so that he would be eligible for a five-year domestic post during the child's high-school years.

Vollmer testified that he is concerned about the crime rate in Peru and the availability of health care for the child. The child is active in many extracurricular activities. Vollmer testified that these activities are available in his area and that he could offer an educational and community environment that would be safer than Lima, Peru. Friedrich acknowledged that Vollmer is involved with the child's doctors and extracurricular activities.

According to Bryan Friedrich, Peru has a slightly lower murder rate than the United States, and it has a lower safety alert level through the Department of State than several other international postings. The child would live in a compound that is patrolled by armed guards, and she would attend a private school. The family housing area in Lima is at the United States post on Peru and has a regional medical officer and staff doctors and nurses.

For 2015, Friedrich proposed a four-week parenting time schedule during the child's winter school break and a three-week visit in the summer. For 2016, Friedrich proposed a five-week winter parenting time visit, including Christmas, and a four-week visit in the summer. Friedrich testified that the child would have access to Skype and that she was comfortable with the technology.

Vollmer testified that he was concerned that the child's move would change his relationship with her. Vollmer believed that it would be "virtually impossible" for him to maintain a close relationship with the child. He did not believe that longer blocks of parenting time would make up for the frequency of his current visitation schedule, and he did not believe that communicating over Skype would allow him to maintain his close bond with the child.

Friedrich testified the child has a very close relationship with her brother. According to Friedrich, the child's maternal grandmother would also accompany the family to Peru and would fly with the child on return trips. Friedrich testified that the child has lived in three cities in the last two years, but "seems to love" moving around and travels well for her age. Friedrich proposed to send Vollmer video recordings of the child's extracurricular activities.

C. THE TRIAL COURT'S DECISION

The trial court granted Friedrich's motion to change the child's legal residence to Lima, Peru. The trial court affirmed that Vollmer and Friedrich had joint legal custody of the child, Friedrich had primary physical custody of the child, and the child was part of an established family with Friedrich and the child's brother. It found that, because the family would travel together, moving to Peru would not change the child's established custodial environment.

Considering the factors in MCL 722.31(4), the trial court found that several factors did not apply or were neutral. However, concerning the benefit to the child, the trial court found that the child would benefit from moving to Lima. The trial court found that the child's main benefit would be remaining in an "intact family in an established environment" and maintaining her relationship with her half-brother.

Considering the capacity of the parent to benefit from the move, the trial court found that Friedrich would benefit from the move because it would allow her to continue to be a full-time, stay-at-home parent, and it would keep her husband on his career track. Considering the capacity of the child to benefit from the move, the trial court found that it was a "much closer" question. The trial court found that the child's living situation would adequately address Vollmer's concerns about crime and health care. The trial court ultimately found that maintaining an intact, economically secure family with Friedrich providing full-time parental care had a greater capacity for improving the child's life.

The trial court found that the move would negatively affect the child's relationship with Vollmer. However, the trial court also found that it was possible to adequately preserve and foster their relationship with extended blocks of parenting time and the use of electronic communication between parenting times. The trial court found that there was a preponderance of the evidence that changing the child's legal residence to Lima, Peru would be in her best interests.

II. THIS COURT'S JURISDICTION

A. STANDARD OF REVIEW

We review de novo whether this Court has subject-matter jurisdiction to hear an appeal because it is a question of law.¹

B. LEGAL STANDARDS

Statutes and court rules determine the jurisdiction of this Court.² This Court has authority to hear, as an appeal of right, an appeal "in a domestic relations action" from "a post-judgment order affecting the custody of a minor."³

C. APPLYING THE STANDARDS

Friedrich contends that this Court does not have jurisdiction over Vollmer's appeal because his appeal is not an appeal of right. We disagree.

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¹ Lapeer Co Clerk v Lapeer Circuit Judges, 465 Mich 559, 566; 640 NW2d 567 (2002); Chen v Wayne State Univ, 284 Mich App 172, 191; 771 NW2d 820 (2009).

² Const 1963, art 6, § 10; *Chen*, 284 Mich App at 191.

³ MCR 7.202(6)(a)(*iii*).

A parent's change in residence may change the child's established custodial environment and may warrant modifying the child's custody.⁴ This Court has jurisdiction as an appeal of right over the trial court's order denying a motion to change the child's legal residence even if the opposing parent did not seek to change the child's custody.⁵

Here, the trial court's order is titled, "Modified Parenting Time and Custody Order." In the order, the trial court affirms the child's current custody arrangement, in which Vollmer and Friedrich maintain joint legal custody over the child and Friedrich has primary physical custody. The trial court did not modify the child's custody, but the trial court's decision to maintain the status quo rather than change it certainly *affects* the child's custody. The trial court's decision in this case is even more explicit than the decision in *Rains*, in which this Court concluded we could review the trial court's order regarding the child's change in legal residence even when it *implicitly* decided not to change the child's custody. We conclude that we have jurisdiction to hear Vollmer's appeal as an appeal of right.

But even were we to agree with Friedrich's jurisdictional argument, we would exercise our discretion to treat Vollmer's appeal as an application for leave to appeal, grant leave, and address the issues presented on their merits. The matter concerns not only the interests of the parties themselves, but the interests of a minor child. This Court should promptly consider issues affecting the custody of minors. We note that Friedrich did not raise this contention until after the clerk scheduled this case for oral arguments, and has not moved to dismiss the case. While these actions do not affect this Court's jurisdiction, we would consider them when exercising our discretion to grant leave to appeal. Accordingly, we would conclude that the interests of the minor child and judicial economy support granting leave and deciding the case on its merits.

⁴ Rains v Rains, 301 Mich App 313, 324; 836 NW2d 709 (2013). See also *Brausch* v *Brausch*, 283 Mich App 339, 358; 770 NW2d 77 (2009).

⁵ *Rains*, 301 Mich App at 319-320.

⁶ *Id.* at 320. (This Court has jurisdiction over a custody order that leaves a custody arrangement "as is.")

⁷ See *Id*. at 323.

⁸ See, e.g., Wardell v Hincka, 297 Mich App 127, 133 n 1; 822 NW2d 278 (2012).

⁹ Cf. *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994) (In passing the Child Custody Act, the Legislature intended to expedite the resolution of child custody disputes by prompt and final adjudications).

III. CHANGE OF LEGAL RESIDENCE

A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion the trial court's decision regarding a change of the child's legal residence. The trial court abuses its discretion when its decision falls outside the range of principled outcomes. 11

This Court must affirm the trial court's findings of fact related to matters of child custody unless they are against the great weight of the evidence.¹² A finding is against the great weight of the evidence when the facts clearly preponderate in the opposite direction.¹³

B. LEGAL STANDARDS

[A] parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued.^[14]

The trial court must engage in a four-step approach to determine whether to grant a party's motion to change the child's legal residence. First, the moving party must establish that a preponderance of the evidence supports that (1) the change in legal residence has the capacity to improve the quality of life for both the child and the relocating parent, (2) whether and to what degree each parent has used his or her parenting time and whether a parent's desire to move is designed to frustrate the other parent's parenting time schedule, (3) the degree to which it is possible to modify the child's parenting time schedule in a way that adequately preserves and fosters the child's relationship with each parent, (4) the degree to which securing a financial advantage motivates the opposing parent, and (5) domestic violence. The child is the trial court's primary focus when considering these factors.

Second, the trial court must determine whether the child has an established custodial environment. ¹⁸ Third, the trial court must determine whether the move modifies the child's

¹⁰ Spires v Bergman, 276 Mich App 432, 436; 741 NW2d 523 (2007).

¹¹ Ewald v Ewald, 292 Mich App 706, 725; 810 NW2d 396 (2011).

¹² McIntosh v McIntosh, 282 Mich App 471, 475; 768 NW2d 325 (2009).

¹³ Berger v Berger, 277 Mich App 700, 705; 747 NW2d 336 (2008).

¹⁴ MCL 722.31(1).

¹⁵ *Rains*, 301 Mich App at 325.

¹⁶ *Id.* at 326-327; MCL 722.31(4).

¹⁷ Gagon v Glowacki, 295 Mich App 557, 565; 815 NW2d 141 (2012).

¹⁸ *Rains*, 301 Mich App at 325.

established custodial environment.¹⁹ And fourth, "if, and only if, the trial court finds that a change of domicile would modify or alter the child's established custodial environment must the trial court determine whether the change in domicile would be in the child's best interests"²⁰

C. QUALITY OF THE CHILD'S LIFE

Vollmer contends that the trial court erred in permitting Friedrich to change the child's domicile because its findings regarding the quality of the child's life were against the great weight of the evidence. We disagree with Vollmer's contention that the trial court inappropriately considered Bryan Friedrich's career advancement when considering the capacity of the move to improve the child's life.

"[T]he relocating parent's increased earning potential may improve a child's quality of life." Here, Friedrich testified that she is a stay-at-home parent and depends on Bryan Friedrich's income to support her family. Thus, while the move would not directly affect Friedrich's earning potential, it would affect the earning potential of the Friedrich family. The family's increased earning potential has the capacity to improve the child's life. Accordingly, the trial court did not err when it considered the effect of Bryan Friedrich's earning potential on the quality of the child's life.

Vollmer also contends that the trial court's finding was against the great weight of the evidence because there was no evidence that the child would be separated from her mother or brother if the trial court denied the motion. We disagree.

Here, the trial court repeatedly and strongly emphasized the capacity of maintaining an intact family to preserve the child's life. As part of maintenance of an intact family, the trial court considered her ability to have "a married parent and stepparent" with Friedrich providing full-time parental care.

Vollmer asks us to speculate about whether Bryan Friedrich would have moved to Peru without Friedrich and the child's brother, or whether Bryan Friedrich could have quickly obtained another posting. We decline to do so. Given the testimony, under any of the circumstances that Vollmer asks us to contemplate, the Friedrich family would face financial instability and it would be likely that Friedrich would be unable to maintain her capacity to be a stay-at-home parent for the child. More importantly, the trial court weighed these possibilities and concluded that the child would benefit more from parental stability and an intact family. The evidence does not clearly preponderate against the trial court's finding.

Finally, Vollmer contends that there was evidence that the child would be unsafe in Peru because of its high crime rates and low medical standards. The trial court heard competing

¹⁹ *Id*.

²⁰ *Id*.

²¹ Ritterhaus v Ritterhaus, 273 Mich App 462, 466; 730 NW2d 262 (2007).

testimony regarding the child's safety and the adequacy of the available medical care in Peru. The trial court chose to credit Bryan Friedrich's testimony regarding the family's living conditions, and it was not convinced that the safety or medical care would be inadequate to protect the child. We defer to the trial court's credibility determinations.²² We conclude that the evidence did not clearly preponderate against the trial court's finding regarding the child's safety.

We conclude that the trial court's finding that the quality of the child's life had the capacity to improve if it granted the motion to change the child's residence was not against the great weight of the evidence.

D. FOSTERING THE PARENT-CHILD RELATIONSHIP

Vollmer contends that the trial court's finding that the modified parenting time schedule would maintain his relationship with his daughter was against the great weight of the evidence. We disagree.

"[T]he visitation plan need not be equal to the prior visitation plan in all respects."²³ The standard is whether a parenting-time schedule "provide[s] a 'realistic opportunity' or 'an adequate basis' . . . to preserve and foster the relationship" between the child and the parent.²⁴ Extended periods of visitation may foster, rather than hinder, a closer parent-child relationship.²⁵ The use of modern technology may diminish the separation between a child and a parent.²⁶

It is undisputed that the trial court's new visitation plan reduces Vollmer's yearly visitation time. The trial court found that the greatest negative consequence of the child's move would be on the child's relationship with Vollmer. However, the trial court ultimately found that the proposed schedule maintained a realistic possibility of preserving the child's bond to Vollmer. Friedrich testified that the child was comfortable using Skype,²⁷ and the child is not so young that it is immediately apparent that she would not benefit from such contact. Further, Vollmer's parenting-time visits are quite lengthy and will allow him to parent the child full-time for long periods without disrupting the child's school schedule.

We conclude that the evidence did not clearly preponderate against the trial court's finding that the parenting-time schedule had a realistic probability of adequately preserving the child's bond with Vollmer.

²² See *Gagnon*, 295 Mich App at 559.

²³ *Id.* (quotation marks and citation omitted).

²⁴ McKimmy v Melling, 291 Mich App 577, 584; 805 NW2d 615 (2011).

²⁵ *Id.* at 583.

²⁶ *Id*.

 $^{^{27}}$ Skype is an online software application that allows users to make voice and video contact over the internet. See id, at 584 n 2.

IV. CONCLUSION

We conclude that the trial court's findings that the move had the capacity to improve the child's life and that the parenting-time schedule provided a realistic opportunity to adequately preserve the bond between the child and Vollmer were not against the great weight of the evidence.

We affirm.

/s/ Douglas B. Shapiro

/s/ William C. Whitbeck

/s/ Cynthia Diane Stephens